IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No. 258

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS,
Appellant,

vs.

STEPHEN B. CORBOY, DRAINAGE COMMISSIONER OF THE CALUMET DITCH,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

REPLY BRIEF FOR APPELLANT.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

List of Cases Cited.

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It is our understanding that the only question now properly before this Court is one of jurisdiction, and that the merits of the case will not now be considered. If counsel for Appellee had not discussed the merits of the case in their brief and argument, we should not feel called upon to make any reply. Since they have done so, however, we do not feel justified in wholly ignoring their argument, and we therefore submit a reference to some authorities in support of Appellant's contentions upon the merits and a discussion of some of the cases cited by counsel for Appellee. Before doing so, however, we will reply briefly to counsel's argument upon the jurisdictional question.

JURISDICTIONAL QUESTION.

Nearly all of counsel's argument on this point is devoted to the proposition that a federal court may not enjoin proceedings in a state court at any stage of such proceedings. To the extent that such proceedings are *judicial in character* we do not controvert their proposition. This Court has, however, recognized a distinction in the character of proceedings pending in a state court. Some proceedings are distinctly judicial in character and may not be enjoined by a federal court. But other proceedings are legislative or executive or administrative in character, and such proceedings may be enjoined. The question, therefore, in this case is whether the act of the Circuit Court of Porter County in constructing the Burns Ditch, is a *judicial* proceeding or a *legislative, executive* or *administrative* proceeding. That is the main issue in this case. The authorities cited by counsel for Appellee do not bear particularly upon this issue. We respectfully submit that the principles announced by this Court in the rate cases cited by us in our brief are applicable to this case. In those cases this Court held that the nature of the final act must determine the nature of the proceedings leading up to that act. The act of constructing the Burns Ditch not being judicial, the decree establishing the ditch must likewise be held not to be judicial. That decree was a *legislative* act and the *fulfillment of that decree* by the construction of the ditch is an *executive or administrative act,* and as such may be enjoined by a federal court.

On page 38 of their argument counsel for Appellee cite *Boom Co.* v. *Patterson,* 98 U. S., 403, and *Union Pacific R. Co.* v. *Myers,* 115 U. S., 2, in support of the proposition that while a proceeding before commissioners appointed to appraise land to be taken by condemnation was in

the nature of an inquest, nevertheless, such proceeding became a suit at law when transferred by appeal to the District Court and was thencefore subject to its ordinary rules and incidents. They cite *County of Upshur* v. *Rich,* 135 U. S., 467, in support of the proposition that while a proceeding by administrative officers looking to the valuation of property for the purposes of taxation was not a suit, yet it did become a suit upon appeal to a court having jurisdiction to determine questions of law and fact, and they cite *In re Jarnecke Ditch,* 69 Fed., 161, in support of the proposition that a drainage proceeding in Indiana is a controversy in a state court in the nature of a civil suit.

We do not deny that in some respects the drainage proceeding in the Circuit Court of Porter County establishing the Burns Ditch is a judicial proceeding. On pages 10 and 11 of our argument we admit that fact. We contend, however, that the entry of the decree establishing the ditch is a legislative act of the Circuit Court of Porter County. Thereafter the construction of the ditch is a purely executive or administrative proceeding of the court, acting through Appellee. Counsel ignore entirely the dual capacity in which the state court acts. Under the Drainage Act the court is first called upon to ascertain whether the facts presented by the petitioning land owners in their petition, and subsequently by the Drainage Commissioners in their report, bring the case within the terms of the Drainage Law. The court must then investigate and ascertain what compensation must be paid to the owner whose land is taken for the proposed ditch and what proportion of the cost of the proposed drainage proceeding must be borne by the owner whose land will thereby be benefited. In so doing the court exercises its judicial functions. The court then enters

the decree establishing the ditch, and while the entry of the decree is the outcome of the judicial investigation, it is in nature a *legislative act*, since the court thereby *establishes the ditch*, just as the legislature itself might in the first instance have done by the passage of a special act. With the entry of the decree the adversary proceeding ended. (See cases cited on pages 11 and 12 of our original argument.)

From that time on the state court, in constructing the ditch through the agency of Appellee, exercises functions of an executive or administrative nature. Its duties thereafter are in no sense judicial. Rights of parties are not adjudicated unless a matter judicial in nature is specially brought before it as a judicial body, in which case of course it exercises its judicial functions. The difficulty in this case arises from the fact that the legislature has conferred upon the same body *judicial* as well as *executive or administrative* powers, and it is necessary to keep the distinction between these powers clearly in mind in deciding the issue presented. In its bill of complaint Appellant sought only to restrain Appellee from performing the purely executive or administrative act of constructing the ditch. In acting in that capacity either Appellant or the court itself may as properly be enjoined by a federal court as was the Virginia Commission in the rate cases.

Our case is not unlike that of a railroad company which proposes to extend its line. It institutes in a state court the necessary condemnation proceeding to acquire title for its proposed right of way, and upon the entry of the decree of condemnation such title is acquired. The actual building of its line over such right of way is in no sense a judicial act, and is in no way related to the condemnation proceeding in which it acquired title to such right of way. But if in constructing its line over such right

of way the company was about to deprive a citizen of any rights which were protected by the Constitution of the United States, can there be any doubt but that such citizen could maintain a suit in a federal court, assuming the necessary jurisdictional facts to exist, to enjoin the company from constructing its line? We submit that in such a suit the company could not successfully contend that the granting of an injunction would be an interference with the state court proceeding under which the company acquired the right to construct such line. Precisely the same situation is presented in the case now before this Court. The petitioning land owners in the Burns Ditch drainage proceeding have acquired the right to build the Burns Ditch through the entry of a decree establishing the ditch. For convenience of administration the legislature has designated the Circuit Court of Porter County, and its agent, Appellee, as the party to construct the ditch. In constructing such ditch Appellee represents and stands for such land owners (see cases cited on page 21 of our argument), and the court itself, so far as it is constructing this ditch, also represents and stands for such owners, and neither Appellee nor the court is exercising any function other than a purely executive or administrative one. Merely because the court has been named by the legislature as the party to construct the ditch does not make his act of constructing the ditch a judicial act. (See case cited on page 15 of our original argument.) Nor does the fact that the legislature has conferred upon the court the power to adjudicate purely judicial issues in the drainage proceeding make the act of constructing the ditch a *judicial act*. By whomsoever performed the act of constructing the ditch is an executive or administrative act entirely separate and distinct from the judicial proceeding and we submit that such act may be enjoined by a federal court.

MERITS OF THE CASE.

The Supreme Court of Illinois and the Supreme Court of Indiana have established the rule that every riparian owner has an equal right to the regular, uniform flow of water of a stream past his land, and that no upper riparian owner may so divert such flow as to destroy the property right of a lower riparian owner in such flow.

Evans v. *Merriweather*, 4 Ill., 492.
Plumleigh v. *Dawson*, 6 Ill., 544.
Bliss v. *Kennedy*, 43 Ill., 67.
Washington Ice Co. v. Shortall, 101 Ill., 46, 54.
City of Kewanee v. *Otley*, 204 Ill., 402, 409-10.
Dilling v. *Murray*, 6 Ind., 324.
Mitchell v. *Parks*, 26 Ind., 354.
Blessing v. *Blair*, 45 Ind., 546.
Taylor v. *Fickas*, 64 Ind., 167.
Mitchell v. *Bain*, 142 Ind., 604; 42 N. E., 230.
Valpariso City Water Co. v. *Dickover*, 17 Ind. App., 233; 46 N. E., 591.
Bump v. *Sellers*, 54 Ind. App., 150; 102 N. E., 875.

In the case last cited a suit was brought by a lower riparian owner to enjoin an upper riparian owner from constructing a drainage ditch which would divert water from the stream flowing through the former's land, to his damage. A perpetual injunction was granted by the court below and the decree was affirmed by the Appellate Court. In the course of its opinion the court said:

> "The court has found as facts that the proposed drain would tap and drain off the water from the natural watercourse, and would divert the water from the stream to plaintiff's damage. It seems to us that these facts are sufficient to bring the case within the well known rule that *an upper riparian owner may not use or divert the waters from a stream in such a way as to destroy or materially diminish the watercourse, or render it unavailable for the use of the lower proprietor.* See *Farnham*,

Water Rights, Secs. 489, 496-500; *Dilling* v. *Murray*, 6 Ind. 324, 63 Am. Dec. 385." (Italics are ours.)

This Court has very recently held that "the right to have the water flow away from the mill dam unobstructed, except as in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of land. A destruction of this right is a taking of a part of the land."

United States v. *Cress*, 243 U. S., 316, 330.

In that case the damage was occasioned by the holding back of water by the government to such an extent that the flow of water in its natural course at the mill was stopped, thereby destroying the mill power. In our case the threatened diversion of water from the Little Calumet River through the proposed ditch will materially lessen the flow of water past Appellee's plant, to its serious damage.

In *Pine* v. *Mayor of the City of New York*, 103 Fed., 337, a citizen of Connecticut filed a bill to enjoin the City of New York from diverting water (in New York) from an interstate stream flowing from New York into Connecticut upon which complainant's land and steam mill (in Connecticut) were located, for the purpose of supplying such water to the City of New York, which diversion would decrease the flow of the stream more than one-fourth. The court held that the statutes of the State of New York did not undertake to give power to condemn for public purposes land which was situated in another state, and that if they had done so they would be ineffective; that the diversion of water could not be excused by the fact *that it was deemed to have been taken for a public benefit*, and that the injunction to prevent a permanent and unauthorized seizure and diversion of the running water in the stream was a proper

remedy, although the pecuniary damage was not large. The decision was affirmed by the Circuit Court of Appeals in *Pine* v. *Mayor,* 112 Fed., 98. In its opinion the Court of Appeals discussed the right of the State of New York to authorize one of its municipalities to divert the waters of an interstate stream to the injury of riparian owners in another state and held that the State of New York had no such authority over property outside its limits and beyond its jurisdiction.

In delivering the opinion of the Court of Appeals, Thomas, District Judge, said (p. 99):

> "Without reference to authorities, certain applicable legal rules may be accepted, viz: (1) The defendant is not a riparian owner, and is not exercising the usual rights of riparian owners; (2) even if the defendant had acquired all the riparian rights save those of the complainants, the diversion is not thereby justified; (3) the State of New York cannot authorize the taking of property in Connecticut; (4) the diversion of the water is not an act which a court of equity could approve or regulate under a power to apportion or adjust the use of the water among riparian owners; (5) the usual powers of the State of New York respecting navigable rivers within its borders do not extend to unnavigable interstate streams; (6) the diversion is a tortious act initiated in New York, and, as to the complainants, taking effect in Connecticut, for which the present suit should lie; (7) the diversion of water at one point is a taking of the property of riparian owners below the point of diversion, and falls within the constitutional protection; (8) the right of the complainants to use the water as it is wont to flow is not an easement, but an incident to, and inseparably connected with, their land; (9) a court of equity, asked to enjoin the taking of property, where such taking is not authorized, and is therefore tortious, will not make its decree for an injunction conditional upon the ascertainment of the value of the property taken, and payment to the complainants, unless there be present facts which should equitably estop the complainants, and limit

> them to such relief. The foregoing propositions are based largely upon principles of the common law, and supported uniformly in all jurisdictions where as to this subject the common law prevails, as it does in the States of New York and Connecticut, unless certain decisions in Massachusetts be exceptions."

The case was then brought to this Court and in an opinion reported in 185 U. S., 93, this Court held that the complainant below had been guilty of laches in allowing the defendant to complete its construction before filing his bill and by other conduct leading the defendant to believe that he would accept compensation and not insist upon his absolute rights. This Court assumed for the purpose of its decision that the plaintiff would suffer substantial damage by the proposed diversion of the water in the stream; that although the stream above the dam and all sources of supply of water to the stream at that point were within the limits of the State of New York, it had no power to appropriate such water or to prevent its natural flow through its accustomed channel into the State of Connecticut; that the plaintiff had a legal right to the natural flow of the water through his farm in Connecticut and could not be deprived of that right by and for the benefit of the City of New York by any legal proceedings either in Connecticut or New York; and that a court of equity at the instance of the plaintiff, at the inception and before any action had been taken by the City of New York would have restrained all interference with such natural flow of the water. The foregoing propositions of law, which were assumed but not decided by this Court in that case, are precisely the propositions of law involved upon the merits of this case, and we respectfully submit that there can be no doubt but that the

propositions assumed by the Court should be accepted as correctly stating the law.

In *Head* v. *Amoskeag Mfg. Co.*, 113 U. S., 1, this Court, in discussing the constitutionality of a mill act, said in its opinion (p. 23):

> "The right to the use of running water is *publici juris* and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, *not interfering with a like reasonable use by those above or below him.*" (Italics are ours.)

In *Cohen* v. *United States*, 162 Fed., 364, the United States government by the construction of a canal so diverted the flow of a stream running through petitioner's land as to injure her property. In passing upon petitioner's rights to the flow of the stream through her land, Morrow, Circuit Judge, said (p. 368):

> "The government has diverted the waters of Sausal Creek at the point where it enters the subsidiary canal, and in effect has taken and appropriated the stream below that point, and the petitioner has been deprived of his flow adjacent to and upon her premises. *This is a taking, within the constitutional provision.*" (Italics are ours)

The right of a lower riparian owner to the continuous flow of water in the stream in its natural state past his land and to make use of such flow for any lawful purpose has been considered by the courts of many other states, and the rule is quite uniformly established that if one, not a riparian owner, diverts water from a stream, or if a riparian owner diverts water from a stream, in either case resulting in present or potential injury to a lower riparian owner, such diversion alone, without proof of actual or perceptible damage to such lower ri-

parian owner, is sufficient ground for granting an injunction.

Stock v. *Jefferson,* 114 Mich., 357; 72 N. W., 132.
Stratten v. *Mt. Hermon Boys' School,* 216 Mass., 83; 103 N. E., 87.
McCarter v. *Hudson County Water Co.,* 70 N. J. Eq., 695; 65 Atl., 489, 494.
Mayor of Paterson v. *East Jersey Water Co.,* 74 N. J. Eq., 49; 70 Atl., 472 (affirmed in 78 Atl., 1134).
Roberts v. *Martin,* 72 W. Va., 92; 77 S. E., 535.
Scranton Gas & Water Co. v. *Delaware L. & W. Co.,* 240 Pa., 604; 88 Atl., 24.
Porter's Bar Dredging Co. v. *Beaudry,* 15 Cal., 751; 115 Pac., 951.

We will now refer briefly to some of the cases cited by counsel for Appellee in support of their contentions in this case.

The cases of *Rickey* v. *Miller,* 218 U. S., 258, *Bean* v. *Morris,* 221 U. S., 485, *Rundle* v. *Delaware, etc., Co.,* 14 Howard, 80, *Manville Co.* v. *Worcester,* 138 Mass., 89, and *Thayer* v. *Brooks,* 17 Ohio, 489, are cited by counsel in support of the proposition that in order to give a *locus standi* to a lower riparian owner, whose lands are in another state, to complain of the diversion of an interstate stream, it must appear that there is a concurrence of the laws of the two states in respect to rights in the stream. An examination of the decisions of the courts of Illinois and of Indiana above cited by us will show beyond doubt that there is a complete concurrence of the laws of the two states in respect to the rights of riparian owners to the uniform, uninterrupted flow of water of the stream upon which their lands are located, and in establishing the rule that no upper riparian owner may so

divert such flow as to destroy the right of a lower riparian owner in the flow. Two of the cases cited by counsel for Appellee support directly Appellant's contentions in this case.

In *Bean* v. *Morris, supra,* this court affirmed the decree of the lower court giving to a lower riparian owner in Wyoming a certain number of inches of water of a stream in priority over the rights of an upper riparian owner in Montana who had been interfering with the natural flow of the stream so as to prevent the lower riparian owner from having his share of the water. In its opinion this court said that the State of Montana had full legislative power over the stream in question, while it flowed within that state, subject, however, *to vested private rights, if any, protected by the Constitution.* Subject to this qualification the concurrence of the laws of Montana with those of Wyoming was necessary to create easements of such private rights and obligations as were in dispute across their common boundary line.

In *Manville Co.* v. *Worcester, supra,* the Supreme Court of Massachusetts sustained the judgment of the lower court giving damages to the owner of a mill in Rhode Island upon the Blackstone River for the diversion of water by the defendant in Massachusetts in a tributary of that river, which diversion materially affected the operation of the plaintiff's mill. The court apparently recognized that the laws of the two states were similar with respect to the rights of riparian owners.

The case of *St. Anthony Falls Company* v. *Water Commissioners,* 168 U. S., 349, and the case of *Shively* v. *Bowlby,* 152 U. S., 1, hold that questions relating to riparian ownership and the ownership of the bed of a stream are local in character and should be decided by

the state laws and that the federal courts will recognize any rules upon these subjects laid down by the highest court of the state. For that reason in the *St. Anthony* case this Court refused to disturb a decision of the Supreme Court of Minnesota holding that the diversion of water from a lake for the use of the City of St. Paul, even though a lower riparian owner upon a stream into which the lake emptied was thereby injured, would not be enjoined, and that damages for such diversion would not be allowed. This Court said (page 371) that there was no decision of the Supreme Court of Minnesota holding that a riparian owner was entitled to the use of all the water which would naturally flow past his lands. If this Court had found that the settled rule of law established by the decision of the Supreme Court of Minnesota did confer upon the riparian owner the right to use all the water naturally flowing past his lands, its decision in the St. Anthony Falls case would, we submit, have been very different, and the relief prayed for in that case would probably have been granted.

The cases of *City of Valparaiso* v. *Hagan,* 153 Ind., 337; *City of Richmond* v. *Test,* 18 Ind. App., 482; *Barnard* v. *Shirley,* 135 Ind., 547; *Taylor* v. *Fickas,* 64 Ind., 167, apparently establish the rule in Indiana that a riparian owner cannot recover damages for injury to his property occasioned by the discharge of sewage into the stream from a city located at a point upon the stream above the land of such owner. It is to be noted that the Constitution of Indiana differs essentially from the Constitution of Illinois, in that the former provides that property may not be *taken* for public use without compensation, whereas the latter provides that property may not be *taken* or *damaged* for public use without compen-

sation. In the City of Richmond case, however, the court again stated—

> "that in the absence of grant, license or prescription limiting his rights, a riparian proprietor has the right to have the waters of a natural watercourse flow along or through his premises as they would naturally flow, without change of quantity or quality."

In these cases the court seems to consider that the use of a stream for carrying away sewage of a city located upon its banks is *one of the natural uses of a stream,* on account of which a lower riparian owner may not complain. It is not controverted that a riparian owner may make any reasonable use of the stream without accountability to a lower riparian owner. He may even draw from the stream such water as may be necessary for his personal consumption and domestic use. A far different situation is presented, however, when a substantial portion of the water in the stream is taken out or diverted from its natural flow, as is alleged will be done in the case now before this Court. Such action involves not merely *injury to the property* of a lower riparian owner, but the actual *taking of his right to have the water flow by his land unobstructed,* which is equivalent to *taking a part of his land,* as was in effect stated by this Court in *United States* v. *Cress, supra.*

As a matter of fact, the doctrine announced in the Indiana cases last above cited has been later criticized by both the Appellate and Supreme Courts of Indiana in the case of *Niagara Oil Co.* v. *Jackson,* 48 Ind. App., 238; 91 N. E., 825, and *Pa. Glass Co.* v. *Schwinn,* 177 Ind., 645; 98 N. E., 715.

Counsel for Appellee attempt to justify their position by a reference to the police power of the State of Indiana. This Court, however, has held that private prop-

erty may not be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety any more than under a police regulation having no relation to such matters, but only to the general welfare.

Chicago, Burlington & Quincy Ry. Co. v. *Drainage Commissioners,* 200 U. S., 561, 592-3.

In the case of *Manigault* v. *Springs,* 199 U. S., 473, a bill was filed to enjoin the damming of a creek which would cause water from a river to flow back upon complainant's property unless he raised and strengthened the banks of the river. This Court denied relief in the case on the ground that the overflow to the mere extent indicated did not constitute a taking of property within the meaning of the law when the damage could be prevented by raising the banks, or that if the damage stated did in fact result it would not justify the interposition of a court of equity. This Court said that private interests are subservient to a proper exercise of the police power of the state, *except where property is taken for which compensation must be paid.* After reviewing some of the cases this Court said (484-5):

> "We think the rule to be gathered from these cases is that *where there is a practical destruction, or material impairment of the value of plaintiff's lands,* there is a taking, which demands compensation, but otherwise where as in this case plaintiff is merely put to some extra expense in warding off the consequences of the overflow." (Italics are ours.)

In the case now before this Court, under the rule established in *United States* v. *Cress, supra,* there will be an *actual taking of Appellant's property* in Illinois, namely, its *right to the enjoyment of the natural flow of the river,* without the hindrance imposed by the operation of the

Burns Ditch, and this Court in the *Manigault* case clearly recognized that such a condition of affairs presented an exception to the rule stated in that case.

In the case of *Hudson County Water Co.* v. *McCarter*, 209 U. S., 349, the question presented was whether the State of New Jersey could, by statute, declare it unlawful for any person to transport water through pipes from the State of New Jersey into some other state. The Hudson County Water Company, under a contract with the City of Bayonne, in New Jersey, had laid mains in that city for the purpose of carrying water from the Passaic River to Staten Island in the State of New York. A proceeding was then brought under the New Jersey statute to enjoin the company from continuing to take water out of the state. The highest court of New Jersey (decision reported in 70 N. J. Eq., 695; 65 Atl., 489) approved a decree enjoining the company from so doing, and upon appeal this Court affirmed the decree. This Court held that the police power of the state was broad enough to sustain the law in question. In its decision this Court used this significant language bearing upon the case now under consideration (p. 356):

> "But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the state in which it flows. *The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.*" (Italics are ours.)

The case of *Kansas* v. *Colorado*, 206 U. S., 46, arose out of a condition of affairs materially different and distinguishable from the conditions in the case now before

this Court. The general rule with reference to the rights of lower riparian owners has been departed from in many of the western states because of mining conditions, and because great areas of those states were utterly useless without irrigation. The legislatures of these states created a right in property owners to divert water from its natural course in a stream through canals and ditches into stretches of land sometimes many miles distant from the stream, for the purposes of mining and irrigation, and this Court has recognized in its decisions that this right of diversion was lawful in the states in which such conditions existed. (*Atchison* v. *Peterson,* 20 Wall., 507, 511-2, and *U. S.* v. *Rio Grande Irrigation Co.,* 174 U. S., 690, 702-3.) The constant diversion of the water in the Arkansas River in Colorado by land owners, for irrigation purposes, materially diminished the flow of the river into the adjoining State of Kansas, and the State of Kansas thereupon instituted a proceeding in this Court against the State of Colorado, and certain of its citizens who were so diverting the water of the Arkansas River, to enjoin such diversion. This Court went into the facts exhaustively and weighed the respective benefits from irrigation to the States of Colorado and Kansas and the injuries to certain portions of the State of Kansas, and came to the conclusion that at the time the bill was filed there was relatively little injury sustained by the State of Kansas, and that, regarding the interests of both states and the right of each to receive benefit through irrigation and in any other manner from the waters of the Arkansas River, the Court was not satisfied that the State of Kansas had made out a case entitling it to a decree. This Court, however, said that if in the future there came a time when the waters of the Arkansas River were so depleted by irrigation in Colorado that there was no longer an equitable division of benefits from

irrigation between the two states, the State of Kansas might institute another proceeding to enjoin the State of Colorado from appropriating more than its fair proportion of the water for irrigation purposes in that state. It seems to us that the fundamental principle underlying that decision is that the State of Colorado could not appropriate the waters of the Arkansas River to such an extent as to seriously injure the State of Kansas.

With respect to the case now before this Court it must always be kept in mind that the rule of law that the water of a stream may not be diverted by any one to the injury of a lower riparian owner is still in force both in the State of Indiana and in the State of Illinois. The State of Indiana, even in the exercise of its police power to reclaim swamp land, may not take away the valuable property right of Appellant to have the water of the Little Calumet River flow by its plant in Illinois in the usual course, since by so doing the state would deprive Appellant of its property without due process of law in direct violation of Section 1 of Article XIV of the Constitution of the United States.

We respectfully submit that Appellant's bill of complaint in the District Court presented a meritorious cause of action and that the court erred in dismissing the bill for want of jurisdiction and that its decree should be reversed and the case remanded for further proceedings.

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